Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket No. 92-266

To: The Commission

PETITION FOR RECONSIDERATION

LONGVIEW CABLE TELEVISION CO., INC. and

KILGORE CABLE TELEVISION CO.

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royalty for carrying broadcast stations that are considered distant signals under section 111 of the Copyright Act. See 37 C.F.R. 308.2(c); Final Rule, Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 Fed. Reg. 52,146 (1982). This royalty was established in response to the Commission's repeal of its rules limiting cable carriage of distant signals. Under CRT rules, Petitioners must pay a special royalty surcharge amounting to 3.75% of cable system gross receipts for each distant signal added after June 24, 1981, where the carriage of that distant signal would have been inconsistent with the Commission's now-repealed distant signal rules.

Under their local franchise agreements, the Longview system is obligated to provide two channels whose carriage would have been inconsistent with the now-repealed distant signal rules and the Kilgore system is obligated to provide one such channel. In point of fact, these channels are now characterized as distant signals subject to the 3.75% surcharge only because the Commission refused to act on Petitioners' waiver request to add the channels under the distant signal rules and then, after the rules were repealed, the Commission dismissed Petitioners' waiver request as moot. See American Video Corp., FCC Mimeo No. 1895 (Rel. July 2, 1981).

The imposition of the 3.75% surcharge for these distant signals significantly increases Petitioners' costs of providing cable service.[1/] Petitioners currently recover these surcharges through separately identified charges to their subscribers. These substantial additional costs are neither incurred nor recovered by the overwhelming

rate per channel exceeds the benchmark, the current rate will be presumed to be unreasonable and may be reduced by up to 10%.

The Commission has recognized that the benchmark system does not necessarily reflect each individual system's costs of providing cable services. One specific and substantial cost element that is not reflected in the benchmark rates, and does not exist for most systems, is the 3.75% surcharge for signals that would have been characterized as impermissible for carriage under the now-repealed distant signal rules.

In particular, of the 13,582 cable systems that paid copyright royalty fees in 1991, only 424 cable systems, or 3%, paid the surcharge.[2/] That the distant signal surcharge represents a substantial cost is evidenced by the fact that its payment by only three percent of cable systems represented more than 25% of the $89.2 million in copyright fees paid by cable systems in 1991. Moreover, the Commission's questionnaire to a sample of cable systems, on which its benchmark rates are based, asked only how many

the surcharge is reflected in the Commission's per-channel rate benchmarks.

The Commission's benchmark rates therefore underestimate the costs and understate the rates for cable systems subject to the 3.75% surcharge, whether or not those systems are subject to "effective competition." The benchmark especially underestimates service costs and overall subscriber rates for systems like Longview, Texas, that pay 7.5% of their gross receipts to carry two channels required by their franchises and subject to the surcharge.

Under the Commission's new regulatory framework, the only relief for such systems is to undertake an expensive cost-of-service showing to demonstrate that the distant signal surcharges result in higher rates. Since there can be no question that the surcharge represents a legitimate cost of service, the requirement to conduct a cost-of-service study imposes an unnecessary economic burden on cable operators, and the need to review such studies imposes an unnecessary administrative burden on the Commission -- all without protecting consumers in any way.

Like franchise fees, the distant signal copyright royalty surcharge is imposed by government. Like franchise fees, the surcharge is readily identifiable. And like many franchise fees, the surcharge is easy to calculate as a percentage of revenues. Accordingly, the much more efficient and expedient administrative course would be to

treat distant signal copyright royalty surcharges like franchise fees, thereby allowing cable systems to remove the 3.75% surcharge from their monthly revenues before calculating their current rate per channel for benchmark purposes.

III. THE REGULATORY HISTORY OF THE DISTANT SIGNAL SURCHARGE FURTHER WARRANTS REDUCING ADMINISTRATIVE BURDENS

Especially in Petitioners' case, fairness and equity in light of previous Commission actions also compel treating the 3.75% surcharge like franchise fees for purposes of calculating the systems' current rates for benchmark purposes. Petitioners' Longview and Kilgore cable systems are located in the Tyler, Texas television market. On June 11, 1980, the Commission granted a waiver of the then-effective distant signal rules to allow another cable operator in other communities in the market to add three distant independent signals, including WTBS, Atlanta, and WGN-TV, Chicago. See Television Cable Service, Inc., 47 RR 2d 1275 (1980). In granting the waiver request, the

Only a few months later, Petitioners sought a similar waiver to carry WTBS and WGN-TV, in addition to KTVT, Ft. Worth. Petitioners argued that the Commission should give controlling effect to its 1980 determination concerning the carriage of WTBS and WGN-TV on cable systems in the market. This waiver request was unopposed.

Contemporaneously, the Commission decided to repeal the distant signal rules. Noting that the Commission staff had apparently decided not to process any pending distant signal waiver requests until the Second Circuit issued its decision on judicial review,[3/] petitioners specifically urged the Commission to act promptly on their waiver request. Petitioners pointed out that the Commission's refusal to act unfairly discriminated among cable systems operating in the same television market.

Two months later, on June 8, 1981, Petitioners informed the Commission that the only local television station then on the air had consented to Petitioners' distant signal waiver request. Under Commission policies in effect at that time, this alone justified a grant of the requested waiver. See Longview Cable Television Co., Inc., 44 RR 2d 1196, 1197 (1978), and cases cited therein.

3/ Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), cert. denied sub nom., National Football League v. FCC, 454 U.S. 1143 (1982), affirming Report and Order in Docket Nos. 20988 and 21284, 79 F.C.C. 2d 663 (1980).

Shortly thereafter, the Second Circuit affirmed the Commission's repeal of its distant signal rules, and the Cable Television Bureau followed with a brief order dismissing as moot 240 pending distant signal and syndicated exclusivity waiver requests, including Petitioners'. American Video Corp., FCC Mimeo No. 1895 (rel. July 2, 1981). WTBS and WGN-TV were subsequently added to the Longview system, and WTBS was added at Kilgore.

In October, 1982, however, the CRT adopted the surcharge of 3.75% of a cable system's gross receipts for each distant signal added after the Commission's repeal of the distant signal rules became effective, unless such new distant signal carriage was either consistent with the FCC's former rules or had been authorized by a waiver of those rules. See Copyright Royalty Tribunal, Final Rule, Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 Fed. Reg. 52,146 (1982). Thus, even though Petitioners had amply demonstrated compliance with the requirements for a waiver of the rules, the Commission's refusal to act on their request resulted in surcharges of 7.5% of gross receipts in Longview and 3.75% in Kilgore.

In an effort to remedy this inequitable situation, Petitioners filed a request with the Commission seeking reinstatement and a grant nunc pro tunc of their original waiver petition. The Mass Media Bureau denied this request

on the grounds that a new market analysis would have to be conducted and that Petitioners' equitable arguments regarding application of copyright rates should be addressed to the CRT. On application for review to the Commission, Petitioners showed that no new market analysis was required, since no new carriage was being proposed. Petitioners also confirmed that the CRT had already determined that the Commission, not the CRT, had authority to grant the exceptions Petitioners sought.[4/] Nevertheless, the Commission denied Petitioners' application. Longview Cable Television Co., Inc. and Kilgore Cable Television, Co., Memorandum Opinion and Order, CSR-3216 (Rel. Jan. 22, 1992).

Petitioners emphasize that they are not here seeking to renew their waiver request or otherwise avoid paying the 3.75% surcharge. Rather, they urge the Commission to avoid compounding the inequity it created when it refused to act in accordance with its own policy and precedent, with the result that Petitioners and other similarly situated systems have to pay those surcharges. There is no reason in law or in policy why those systems now must be subjected to the additional burden and expense of

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[4/] However, as Petitioners explained in their request for reinstatement, though the Copyright Royalty Tribunal was "sympathetic to the disparities caused, in part, by the procedural situation at the FCC," it found that it did not have authority to grant any exceptions. Letter of the Copyright Royalty Tribunal to the General Counsel, Copyright Office, March 30, 1984, Appendix to Interim Regulations, 49 Fed. Reg. 14,944, 14,952-94.